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Before the
Federal Communications Commission
Washington, DC

APR 29 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 93-107
)	
DAVID A. RINGER)	File No. BPH-911230MA
)	
ASF BROADCASTING CORP.)	File No. BPH-911230MB
)	
WILBURN INDUSTRIES, INC.)	File No. BPH-911230MC
)	
KYONG JA MATCHAK)	File No. BPH-911230MF
)	
SHELLEE F. DAVIS)	File No. BPH-911231MA
)	
WESTERVILLE BROADCASTING COMPANY)	File No. BPH-911231MB
LIMITED PARTNERSHIP)	
)	
OHIO RADIO ASSOCIATES)	File No. BPH-911231MC

For Construction Permit for an
FM Station on Channel 280A in
Westerville, OH

To: Administrative Law Judge
Walter C. Miller

OPPOSITION TO MOTION TO CERTIFY

Dan J. Alpert, Esq.

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OPPOSITION TO MOTION TO CERTIFY

FEDERAL COMMUNICATIONS COMMISSION
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Shellee F. Davis ("Davis"), by her attorney, hereby submits her opposition to the "Motion to Certify Questions to the Commission" filed on April 22, 1993 in this proceeding. With respect thereto, the following is stated:

Ohio Radio Associates ("ORA") continues to claim that Davis' application is "short-spaced" and should have been dismissed by the Commission. It further claims that the acceptance of Davis' application is contrary to established Commission policy, and therefore its appeal should immediately be considered by the Commission.

ORA's Motion should be denied. The action taken by the Commission is in full accord with established Commission policy. The allotment in question in this proceeding is a "grandfathered allotment" -- one established prior to the establishment by the Commission of its new 6 kW rules (Amendment of Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations, 4 FCC Rcd 6375 (1989)) which became effective on October 2, 1989 -- and consequently applications filed for the allotment are entitled to processing under Section 73.213(c)(1) of the Commission's Rules. As the staff correctly determined, Davis' application is fully-spaced under that rule -- therefore the "North Texas" policy cited by ORA (Motion at 1-2) is not even implicated. The Commission specifically grandfathered vacant "allotments" as well as "stations" when adopting its new Rules. Section 73.213 specifically states:

New stations on channel allotments made by order granting petitions to amend the Table of Allotments which were filed prior to October 2, 1989 may be authorized in accordance with paragraphs (c)(1) or (c)(2) of this section.

47 C.F.R. § 73.213(c). Pursuant to that Section many "short-spaced allotments" (if analyzed

under Section 73.207 rather than Section 73.213(c)(1)) have been properly created, and "short-

specifically allowed for other-than omnidirectional operations to be used to effectuate this policy.

As it stated in adopting the rule:

If a station wishes to operate with greater ERP than that would be permitted for its milage bracket, it may do so (up to the maximum for its class) by directionalizing so as to reduce radiation in the critical direction to which would be permitted under the Table.

Revision of FM Rules, 3 R.R.2d at 1581. Similarly, as the Commission stated in Amendment to Part 73 of the Rules, 6 FCC Rcd 3417, 3423 (1991), it remains Commission policy to allow applicants to employ directional antennas to limit their effective radiated powers in the direction of short-spaced stations to 3 kW levels. In the recent case of Vergennes, Vermont, an applicant (Lakeside Broadcasting Corp., File No. BPH-910822MB) specifically applied for the short-spaced allotment in the same manner as Davis -- applying at a site "short-spaced" under the 6 kW rules (but which a fully-spaced site under the 3 kW rules), proposing radiation equivalent to 3 kW/100 meters in the short-spaced direction and 6 kW/100 meters in all other directions, and invoking Section 73.213(c)(1) of the Rules. See Attachment 1. The application was accepted for filing on December 27, 1991 (Report No. NA-155 (Dec. 27, 1991)), and was granted on October 27, 1992. Report No. 21501 (Nov. 3, 1992). Thus, again, it is seen that Davis' proposal is in full accord with established Commission policy, and there is nothing "unique" about the analysis in the HDO which differs from established Commission precedent.²

² In this way, the applicant continues to operate at parameters identical to a 3 kW Class A station in the direction of the short-spaced station, but it allows the applicant to propose operation to the full power levels otherwise permitted by the station's class in other directions. Amendment to Part 73 of the Rules, 6 FCC Rcd at 3423 ¶ 40. This allows for a more full utilization of the allotment.

Finally, ORA again is attempting to apply the ruling in John M. Salov, 8 FCC Rcd 172, 174 ¶ 17 (1993), to imply that Section 73.213 is inapplicable to any "vacant allotment." Motion at 3. As explained previously, such a broad reading would fly in the face of the specific language of Section 73.213(c), which specifically states that grandfathering rights are bestowed upon "allotments" as well as "stations." Also, putting aside the fact that Salov was a case concerning an application filed for an already-deleted allotment, Salov dealt with the unique situation where the allotment became vacant and the allotment was "short-spaced" even under what is now the old (3 kW) rule, and thus was a vacant allotment which no longer was

"short-spaced" station. As the Commission repeatedly has made clear, "short-spaced" applications on non-short-spaced channels are acceptable in the appropriate circumstances. Therefore, the Commission correctly concluded that Saloy does not operate to reverse the Commission's determine that it is grandfathering (under the 3 kW rules) existing stations and allotments, and ORA's arguments again are specious. The HDO is not inconsistent with Commission policy or precedent.

For all of these reasons, ORA's Motion does not present a new or novel question of law, and the HDO does not patently conflict with established Commission policy. Therefore, ORA's Motion should be denied.³

WHEREFORE, it is respectfully requested that the "Motion to Certify Questions to the Commission" be denied.

Respectfully requested,

SHELDEE F. DAVIS

By:


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³ ORA's additional claim that Davis' amendment that was filed as a matter of right should not have been accepted and its acceptance is contrary to Commission policy (Motion at 5) also is incorrect. Davis' amendment was timely filed on March 9, 1992, on the deadline date for amendments as a matter of right (Attachment 4), and a copy of the amendment was presented to the Commission Secretary's Office when it was found that an incorrect date appeared on the copies retained by the Staff. An affidavit explaining the matter was filed, establishing that the records were properly corrected. Attachment 5. This was permissible. See HDO at n. 8. Therefore, there is nothing "mysterious" occurring -- a mistake was made by the Secretary's Office, and it was corrected in a timely, proper, and equitable manner.

Also, there was no improper contact with the Commission staff on behalf of Davis.

ATTACHMENT 1

DISCUSSION

This firm has been retained by John M. Salov to prepare the required engineering report in support of an application for a new FM Broadcast station, serving the area of Hudson, Michigan.

FM Channel 249(A), 97.7 MHz, is listed for use at Hudson, and this application proposes the use of that channel. The data contained in this report is responsive to the rules of the Commission, and provides the data for FCC Form 301, Sec.V-B.

A transmitter site has been secured, for the purpose of this application, at a location that provides compliance with 47 C.F.R. 73.315(a) and (b).

The FAA has been notified of the proposed tower construction, and Form 7460-1 has been filed with that agency, as required.

It is proposed to operate the transmitter by remote control, from a studio location within the corporate limits of Hudson, Michigan. The exact studio location will be determined following the grant of this application.

The transmitter site proposed in this application does not fully meet the requirements of 47 C.F.R. 73.207, concerning spacings to other FM Broadcast facilities.

A waiver request concerning the proposed short spacing is included as part of this discussion, with complete details concerning the use of Channel 249(A) at Hudson, Michigan. A tabulation of the spacings involved in the allocation is included on page 4, and continuing.

RADIATION PROTECTION: This proposal has been evaluated for compliance with FCC guidelines concerning human exposure to radiofrequency radiation. The standards employed are detailed in OST Bulletin No.65, October 1985.

Table 1 of Appendix B was employed for this study concerning FM broadcast radiation protection.

For the effective radiated power and type of antenna proposed, the minimum antenna radiation center above ground is specified as 13.6 meters.

This application proposes an antenna height above ground of at least 98 meters. Therefore, full compliance with the guidelines is attained by the instant application.

In addition to the protection afforded by the proposed antenna height above ground, the facility will be properly marked with signs, and entry to the facility will be restricted by means of locked fencing.

Any other means as may be required to protect employees and the general public will be employed.

TABULATION OF PROPOSED SERVICE ON CHANNEL 249A

Hudson, Michigan

Frequency: 97.7000 MHz

Antenna elevation (AMSL): 395 Meters

AZIMUTH	AVERAGE ELEVATION 2 TO 10 MILES	ANTENNA HEIGHT ABOVE AVERAGE TERRAIN	DEPRESSION ANGLE TO RADIO HORIZON	EFFECTIVE RADIATED POWER	DISTANCES TO CONTOURS		
					CITY GRADE (70 dBu)	URBAN (60 dBu)	RURAL (50 dBu)
N 0 E	319 M	76 M	.24 Degr	4.80 dBk	11.9 km	21.3 km	.0 k
45.0	311	84	.25	4.80	12.6	22.4	.0
90.0	271	124	.31	4.80	15.2	26.9	.0
135.0	263	132	.32	4.80	15.7	27.6	.0
180.0	267	128	.31	4.80	15.4	27.3	.0
225.0	278	117	.30	4.80	14.8	26.2	.0
270.0	325	70	.23	4.80	11.4	20.4	.0
315.0	327	68	.23	4.80	11.3	20.1	.0

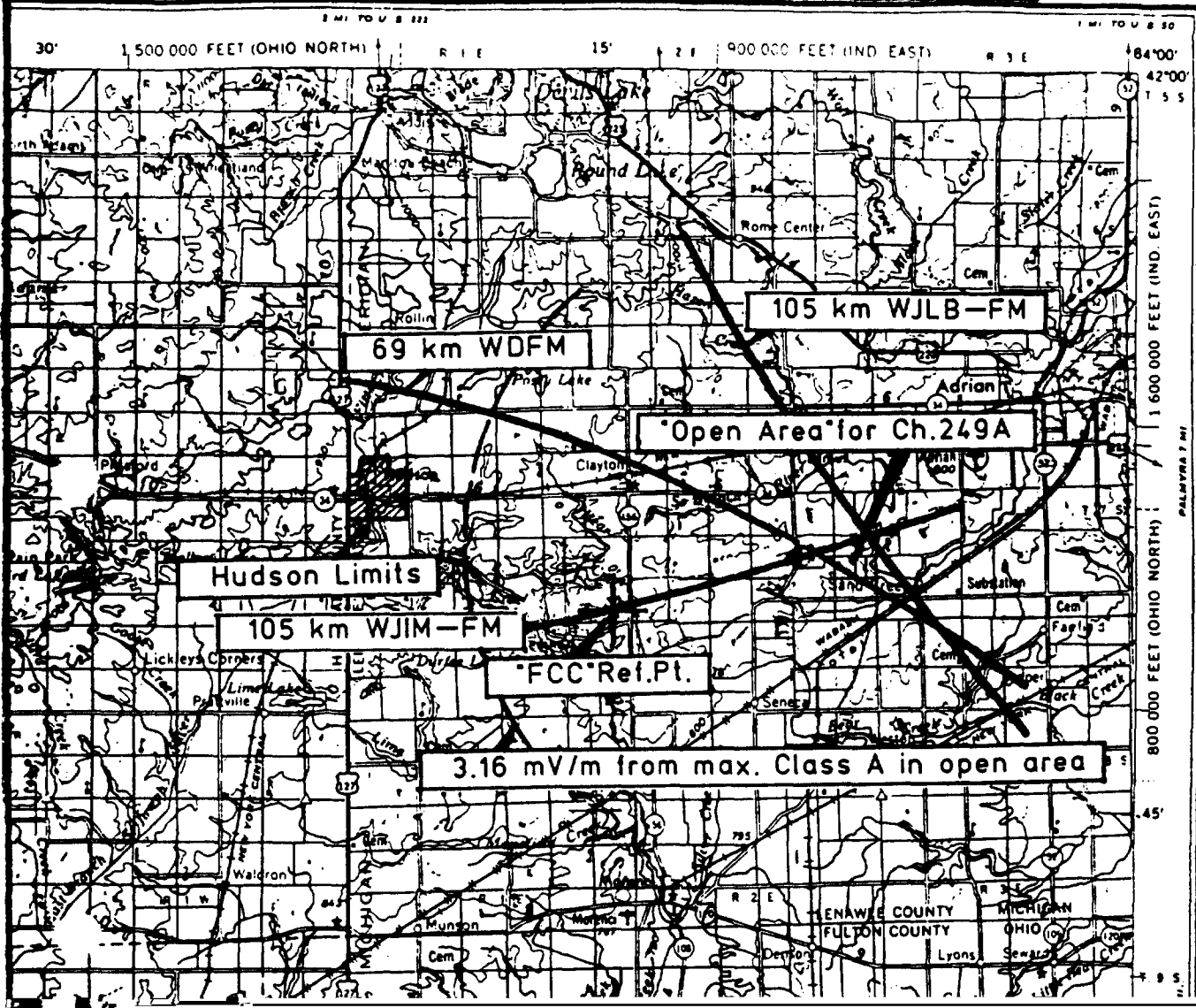
Average
of 8
Standard
Radials

295 M 100 M

TABULATION OF SPACINGS FOR CHANNEL 249A

FM SEARCH RESULTS FOR: NORTHLANDS COMMUNICATIONS - HUDSON, MICHIGAN N 41-53-06 W 84-18-57 CHANNEL 249A															
SEPARATION															
CALL	LOCATION	STATE	CHANNEL	STATUS	N. LATITUDE			W. LONGITUDE			AZ		IN KM		RESULT:
											DEG.	ACT	REQ		
WJZW	GOSHEN	IN	249A	LIC	41	36	4	85	55	41	257.3	138.0	105	CLEAR	33.0 KM
WJLB	DETROIT	MI	2503	LIC	42	24	22	83	6	44	59.3	115.0	105	CLEAR	10.0 KM
WGPD-FM	GRAND RAPIDS	MI	2503	LIC	42	47	46	85	38	58	313.2	149.0	105	CLEAR	44.0 KM
ALLOD	HUDSON	MI	249A		41	49	0	84	14	30	141.0	10.0	105	*SHORT*	95.0 KM
WJIM-FM	LANSING	MI	2483	LIC	42	44	22	84	30	43	350.4	96.0	105	7 7 7	9.0 KM
WJIK-FM	LANSING	MI	2483	CP	42	44	23	84	30	43	350.4	96.0	105	7 7 7	9.0 KM
WEJT	HONROE	MI	2480	LIC	41	55	7	83	26	12	86.8	73.0	0	FVI	
WTHR	HONROE	MI	2524	LIC	41	50	43	83	27	59	93.3	71.0	27	CLEAR	44.0 KM
WGGN	CASTALIA	OH	249A	LIC	41	23	48	82	47	31	112.7	138.0	105	CLEAR	33.0 KM
WDFM	DEFIANCE	OH	2515	LIC	41	17	28	84	32	17	195.7	69.0	69		7.0 KM
WTGN	LIMA	OH	249A	LIC	40	45	26	84	8	12	173.1	126.0	105	CLEAR	21.0 KM
WEOB1605	JAK HARBOR	OH	247A	APP	41	32	25	83	15	52	113.4	96.0	27	CLEAR	69.0 KM
ALLOD	SANDUSKY	OH	249A		41	26	54	82	42	24	109.4	143.0	105	CLEAR	39.0 KM
ALLOD	TOLEDO	OH	2524		41	38	48	83	32	30	112.2	70.0	27	CLEAR	43.0 KM

As this tabulation shows, the transmitter site proposed in this application is short spaced to the transmitter site of WTTM-FM OH



ATTACHMENT 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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construction permit for a new FM broadcast station to operate on Channel 249A at Hudson, Michigan. The Commission further announced that any such applications would have to be filed on or before January 18, 1989. A copy of the Window Notice is attached and marked Exhibit A.

2. Promptly upon issuance of the Commission's notice, John M. Salov made plans to apply for a construction permit for a new FM broadcast station at Hudson, Michigan. Mr. Salov soon found that no transmitter site was available which will provide city grade service to Hudson, and was not short spaced to some other station. However, Mr. Salov was mindful that, by action taken in Docket 87-121, and announced December 12, 1988, the Commission adopted new rules permitting FM station assignments to be short spaced where a directional antenna is utilized to protect other stations from interference. A copy of the Commission's announcement in Docket 87-121 is attached and marked Exhibit B.

3. Mr. Salov was advised by his consulting engineer that the text of the Report and Order in Docket 87-121 had not yet been released and that, accordingly, specific standards had not yet been announced for the use of directional antennas to protect other stations from interference. Salov's consultant advised him, however, that when that text was released there was no doubt that it would be possible to allocate a station on Channel 249A at Hudson which would create no interference to any other station. It was decided, therefore, to go forward with an application specifying a short spaced site; meet the Commission's announced

filing deadline; and amend the application as soon as possible to eliminate any interference to other stations.¹

4. The application was complete and was ready for filing on January 16, 1989, one day before the deadline. On that day, however, Mr. Salov's consultant received a copy of a window notice, issued by the Commission on January 13, 1989, one business day prior to the January 18, 1989, filing deadline.² A copy of that notice is attached and marked Exhibit C. It purported to delete Hudson, Michigan, from the public announcement made on December 13, 1988, stating that there are "technical difficulties with this channel".

5. On January 18, 1989, Salov tendered his application for a construction permit for a new FM broadcast station at Hudson, Michigan. Salov accompanied the application with a "Petition for Reconsideration and For Acceptance of Application". On August 31, 1989, however, the Chief, Audio Services Division issued a letter opinion, a copy of which is attached and marked Exhibit D, purporting to deny Salov's petition. Salov appeals from the decision of the Chief, Audio Services Division.

¹ An application may be filed on a short spaced basis, provided that it is timely amended to eliminate the short spacing and/or otherwise comply with the applicable rules. Midcom Corp., 39 Pike and Fischer RR 2d 943 (1977).

² The 14th, 15th, and 16th of January were all government holidays. Consequently, the only business day following January 13 and prior to the filing deadline was January 17, 1989.

**II. The Decision of the Chief, Audio Services Division,
Like the Action of the Mass Media Bureau,
Was Arbitrary and Capricious, and Must Be Reversed.**

6. It is well-settled that an agency is bound by its own rules, and the public dealing with the agency is entitled to rely upon those rules Service V. Dulles, 354 U.S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957). Here, Section 73.3564(d)(3) of the Commission's Rules and Regulations provides for the issuance of "window notices" inviting the public to file applications for construction permits for new FM broadcast stations. Here, acting pursuant to its rules, the Commission issued a proper "Window Notice" (CF-12), inviting applications for construction permits for a new FM broadcast station to operate on Channel 249A at Hudson, Michigan. Salov was entitled to rely upon that notice. Indeed, Salov did rely upon the notice and expended large amounts of money, time and effort in reliance thereon.

7. Of course, there may be cases in which a "window notice" might be issued by mistake. Thus, it could happen that, through some error, the Commission might put out an invitation for the filing of applications which might result in an intolerable short-spacing to some existing station. In such cases, the Commission could certainly take action to rectify its mistake. That is not the situation here, however. In this instance, there is nothing to indicate that Window Notice CF-12 was issued by mistake.

8. To the contrary, by the time that the notice was issued, the Commission had already adopted rules permitting applicants to use directional antennas, so as to protect existing stations from electrical interference, resulting from minor "short-spacings"³. The rules had not become effective, because they require the adoption of new application forms and those application forms were not approved by the Office of Management and Budget and put into effect until June 26, 1989. Nevertheless, the Commission had announced the adoption of the new rules on December 12, 1988, more than a month prior to the tender of Salov's application⁴.

9. Salov located a transmitter site which involved a minor short-spacing with Station WJIM-FM, Channel 248B, Lansing, Michigan. An application was tendered with a request for waiver of that short-spacing. Thereafter, on February 22, 1989, the Commission released its Report and Order in Docket 87-121, issuing specifications for the use of directional antennas to protect existing stations from electrical interference, resulting from minor short-spacings. The actual rules implementing these changes became effective on June 26, 1989.

10. Thus, as matters stand, an application can be readily designed and filed for the Channel 249A allotment at

³ See Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas, 4 FCC Rcd 1681 (1989).

⁴ See Report Number DC-1304, Action in Docket Case, released December 12, 1988, a copy of which is attached and marked Exhibit B.

would not "work". As pointed out in Salov's original "Petition for Reconsideration and For Acceptance of Application", sites existed which could have been utilized without short-spacing, pursuant to a request for a waiver of the city coverage provisions of the rules. Sites also existed which would comply with the city coverage requirements of the rules, but would require a waiver of a minor short-spacing or short-spacings. Moreover, the Commission knew that it was in the process of adopting new rules which would allow applicants to apply for the Channel 249A assignment, without any waiver request by using a directional antenna. Thus, there was no reason why the assignment would not "work" and no reason why it should have been deleted.

13. Under the rules presently in effect, an application can be filed for Channel 249A at Hudson, Michigan in full conformity with all of the Commission's Rules and Regulations. Thus, there is no present reason to delete Channel 249A from Hudson, Michigan, and there was never any reason to delete the Channel. While the Commission will not ordinarily make a new allocation which requires the use of a short-spaced site, the Hudson allotment was an "old " allotment, which had been in existence for a long time. The Commission has enacted a rule, Section 73.213 of the Commission's Rules and Regulations, which purports to "grandfather" these old allotments and provide flexibility for stations operating under these old allotments to change their transmitter sites and operating facilities. Moreover, Section 73.215 of the Commission's Rules and Regulations, as

recently amended, enables the use of directional antennas, in cases where Section 73.213 does not offer adequate flexibility. The Channel 249A allotment at Hudson, like many other old allotments, may present "technical difficulties" resulting from other allotments which had been made. However, the allotment is no more unworkable than many others. Indeed, it is perfectly feasible to design an application for that allotment which complies with each

ATTACHMENT 3

Statement A

ALLOCATION CONSIDERATIONS

prepared for
Lakeside Broadcasting Corporation
Vergennes, Vermont

Ch 244A (96.7 MHz) 3.4 kW (H&V) 131 m

The Vergennes, Vermont allotment was proposed prior to October 2, 1989. Therefore, with respect to domestic facilities, the allotment is considered to be a 6 kilowatt class A allotment, except with respect to stations WDOT, Warren, Vermont and WLTN, Littleton, NH towards which the allotment may be considered as a 3 kilowatt class A facility.

The site proposed for use by Lakeside, however, meets the required distance separations of Section 73.207 toward all U.S. stations, except WLTN. Towards WLTN, the site meets the distance separation requirements of Section 73.213(c) as a 3 kilowatt equivalent facility.

Lakeside is proposing to operate with facilities equivalent to 3 kilowatts at 100 meters towards WLTN, and 6 kilowatts at 100 meters in all other directions. A directional antenna will be employed to satisfy these criteria. Figure 4A and Table 1 describe the proposed directional antenna envelope pattern. The exact antenna design and manufacturer have not been selected; the horizontally polarized and vertically polarized radiation components will not exceed the envelope pattern of Figure 4A. The directional antenna will be mounted in the manner specified by the manufacturer; any top mounted platform on this tower will not exceed the cross sectional area of the tower. No other antennas are contemplated for this tower. Any antennas installed in the future will be separated by no less than the minimum distance specified by the manufacturer of the proposed FM antenna.

The allotment, and Lakeside's proposed site, do not meet the minimum distance separation requirements (as a class B1 allotment) towards Canadian station CKOI-FM, Verdun, QU. From discussions with Commission Staff, it was determined that the Vergennes allotment was accepted by Canada as a specially negotiated class 31 allotment.

Therefore, it is believed that the allotment is satisfactory for use as a 6 kilowatt class A facility. Accordingly, the maximum power/height combination proposed by Lakeside is equivalent to 6 kilowatts at 100 meters. In addition, for the 3.4 kilowatt power level proposed at effective antenna height of 131 meters, the 34 dBu interfering contour towards Canada will extend no further than would a 25 kilowatt/100 meter (maximum class B1) facility located at the allotment reference point. Figure 4 is a map showing the hypothetical 25 kilowatt/100 meter 34 dBu (class B1) contour from the reference point as compared to the 3.4 kilowatt, 131 meter 34 dBu contour proposed by Lakeside.

It is believed that this proposal, therefore, meets all applicable distance separation and interference protection requirements towards both domestic and Canadian facilities. In the event that the Commission determines that this proposal does not meet the terms of the specially negotiated short-spacing at equivalent power to 6 kilowatts towards the Canadian stations, it is hereby respectfully requested that the proposal be submitted to Canada for concurrence.

ATTACHMENT 4